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No. 83-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Air Line Pilots Association, International ("ALPA") submits this brief in opposition to the petition for a writ of certiorari as to the second question[1] presented by petitioner Trans World Airlines, Inc. ("TWA").

QUESTIONS PRESENTED

1. Whether an employer, which has been found to have jointly violated the Age Discrimination in Employment Act ("ADEA") with a labor organization, may shift a portion of the damages recoverable under Section 7(b) of the ADEA, 29 U.S.C. §626(b), to that labor organization?

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[1] "Whether a labor union found to have jointly violated the Age Discrimination in Employment Act with an employer can nonetheless be absolved as a matter of law from any liability for back pay?"

2. Whether Congress, in its incorporation of Fair Labor Standards Act ("FLSA") remedies in Section 7(b) of the ADEA, 29 U.S.C. §626(b), provided for any monetary relief against a labor organization which has been found to have jointly violated the ADEA?

STATUTES INVOLVED

In its petition, TWA noted that Sections 4(a), (c), (f)(1), (f)(2), 7(b) and 12(a) of the ADEA, 29 U.S.C. §§623(a), (c), (f)(1), (f)(2), 626(b), and 631(a), were involved in this case. In addition, Sections 3(d), 6(d), 15(a)(2), (3), 16, and 17 of the Fair Labor Standards Act of 1938 ("FLSA") 29 U.S.C. §§203(d), 206(d), 215(a)(2), (3), 216 and 217 are set forth in Appendix "A".

STATEMENT OF THE CASE

TWA employs flight deck crew members in Captain, First Officer, International Relief Officer, and Flight Engineer status. Pursuant to the seniority system embodied in collective bargaining agreements ("Agreement") between TWA and ALPA, flight deck crew members may be awarded vacant positions in another status (i.e., a captain may bid for, and be awarded a flight engineer vacancy), or in limited circumstances may "bump" incumbents (i.e, a captain displaced in a reduction in force may bump an incumbent flight engineer with lesser seniority).

As enacted in 1967, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634, expressly authorized involuntary

retirement pursuant to the terms of an existing bona fide employee benefit plan. United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977). Sections 4.1 and 4.2 of the TWA retirement plans ("Plan") have provided that all flight deck crew members "must retire" on their normal retirement date at age 60, "unless written approval of the Company is granted for continuance in employment." The Federal Aviation Administration Age 60 Rule, 14 C.F.R. §121.383(c), does not permit service as a "pilot" after age 60; the FAA does not consider a flight engineer to be a "pilot" within the meaning of 14 C.F.R. §121.383(c).

Effective April 6, 1978, Congress amended the ADEA to eliminate a bona fide employee benefit plan defense for mandatory retirement at an age less than 70. On

August 10, 1978, TWA adopted a policy which permitted all flight deck crew members in "flight engineer status" prior to age 60 to continue in employment past age 60. From 1950 to August 1978, TWA had not permitted any flight deck crew member to serve past age 60.

While TWA permitted flight deck crew members in "flight engineer status" to continue in employment, it terminated the seniority rights of those whom it considered not to be in that status at age 60. That critical distinction in the August 10, 1978 policy was a matter of unilateral decision by TWA. The seniority system embodied in the pilot Agreement does not contain any age-based limitation on the exercise of seniority rights, ALPA v. TWA, A-26; TWA management employees testified

(in depositions), without contradiction, that ALPA played no role in formulating that August 10, 1978 policy.[2]

TWA has justified its adoption of the August 10, 1978 policy, inter alia, on the grounds that §4.2 of the Plan expressly authorizes TWA to permit any flight deck crew member to serve past age 60. The TWA Pilot System Board of Adjustment,[3] in an opinion by Neutral Harry T. Edwards, held that the August 10, 1978 "Policy was adopted unilaterally in an attempt to comply with the 1978 amendments to the ADEA[;] [i]t is clear, therefore, that the Policy was not contractually mandated."[4]

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[2]Deposition of J. Hilly at 1051; J.E. Frankum at 203, 206. See ALPA Petition for Rehearing Br. at 14.

[3]The System Board is established, pursuant to the mandate of 45 U.S.C. §184, to resolve disputes concerning the interpretation or application of the Agreement.

[4]A copy of the Award, issued in 1979, and

In ALPA v. TWA, filed on August 10, 1978, ALPA challenged the new policy as a unilateral change in flight deck crew member working conditions, as embodied in the 1977 Agreement, in violation of Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§152, Seventh and 156. In Thurston v. TWA, plaintiffs asserted that depriving captains disqualified by the FAA Age 60 Rule of seniority rights to transfer to flight engineer positions violated ADEA. TWA did not assert any cross-claim against ALPA, or otherwise claim that any injury allegedly caused to plaintiffs by TWA was a result of conduct by ALPA, in its answer to the Thurston amended complaint.

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submitted by TWA as an Exhibit in support of its motions for summary judgment in the district court, is contained in Appendix "B".

The District Court entered summary judgment in favor of TWA and ALPA in Thurston. The Court of Appeals reversed that decision; even though plaintiffs had not moved for summary judgment below, and ALPA had informed the Court of the existence of disputed issues of material fact concerning alleged violations of §4(c) of ADEA, 29 U.S.C. §623(c), the Court of Appeals directed entry of judgment against ALPA and TWA. In its original decision of August 1, 1983, the Court held that while the ADEA did not provide any legal remedies against unions, an equitable backpay remedy should be implied. A-34-35. After consideration of ALPA's petition for rehearing, the Court corrected its decision to hold that the ADEA did not authorize any monetary remedies against ALPA. A-38.

The Court of Appeals found that ALPA had aided and abetted TWA's violation of ADEA by agreeing to incorporate §4.2 of the Plan in the 1979 Agreement; that, in 1980, ALPA had "caused" TWA to modify its 1978 policy adversely to plaintiffs;[5] and that ALPA had

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[5]The contractual seniority system both requires TWA to list an "effective date" for each vacancy, and permits TWA to adjust the effective date of the bids. After TWA implemented its August 10, 1978 policy, it unilaterally decided to allow captains awarded flight engineer bids with an "effective date" prior to their 60th birthdays to postpone commencement of service as a flight engineer until after age 60. While adjustments of effective dates, or even cancellation of bids, may be necessary for operational reasons, there is no evidence that TWA had previously allowed pilots' bidding for lower paying vacancies to postpone the effective date in order to minimize loss of pay.

Following a January, 1980 meeting, in which ALPA requested that TWA require <u>all</u> pilots to fulfill flight engineer bids in a timely manner, TWA implemented a new "timely manner" policy in 1980. The record is, at best, unclear concerning the causal nexus between the new policy and the January, 1980 meeting. The deposition testimony of a TWA official, which was the <u>only</u> evidence before the Second Circuit concerning the development of the policy,

attempted to cause TWA to violate the ADEA

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states: "I can't say for sure whether or not it was the result of the meeting. It just so happens that our reading of the agreement coincided on that possibility." J.A. 1071.

Plaintiffs challenged this policy on the grounds that it caused captains who actually served as flight engineers to lose "pay and responsibility, in contrast to the 1979 situation when virtually all downbidders were permitted to complete their full careers as captains" (Appellants Br. at 18); they neither argued nor proved that age 60 captains received less favorable treatment in this regard than younger downbidding pilots. See, e.g., EEOC v. ALPA, 661 F.2d 90 (8th Cir. 1981). Plaintiffs did not claim that the "timely manner" policy resulted "in the cancellation of bids awarded three downbidding EEOC plaintiffs," ALPA v. TWA, A-32; indeed, only two plaintiffs reached age 60 after January 1980 (H.W. Lewis, 11/24/80; D.V. Roquemore, 8/21/81). Notwithstanding, this record, the Second Circuit concluded that:

> The evidence is undisputed that ALPA caused TWA to institute the requirements that successful downbidders 'fulfill their bids in a timely manner,' resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs...."

A-32.

in 1978 by trying to persuade it to retain its age 60 policy and opposing "TWA's unilateral action in August 1978...." A-32.

Based on the above determinations, the Court concluded that "ALPA is liable under 29 U.S.C. §623(c) to the EEOC plaintiffs who were damaged by its conduct." A-33 (emphasis added). In its original decision, the Court then directed the district court

> "to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion, after such evidentiary hearing as may be necessary for that purpose."

A-35. In its corrected decision, the Court revised these directions to "award to each plaintiff such relief as it is entitled to against each defendant...." A-39.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OTHER COURT OF APPEALS DECISIONS

As TWA notes in its petition, the Second Circuit is the only Court of Appeals to have addressed the question of union monetary liability for violation of ADEA. Only two district court decisions have directly addressed the issue.

In Neuman v. Northwest Air Lines, Inc., 28 FEP Cases 1488 (N.D. Ill. 1982), the Court held that §7(b) of ADEA does not provide for any recovery of money damages against labor organizations which violate §4(c) of ADEA, since neither §16(b) nor §17 of the FLSA, as incorporated in §7(b) of ADEA, have been construed to authorize

money damages against unions which violate the FLSA or EPA.

In EEOC v. ALPA, 489 F.Supp. 1003 (D. Minn. 1980), rev'd on other grounds, 661 F.2d 90 (8th Cir. 1981), the Court held that the EEOC could recover backpay against ALPA, relying on the general language in §7(b) of ADEA, 29 U.S.C. §626(b) ("the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter") to supersede the "reference in §626(b) to the FLSA." 489 F.Supp. at 1009. The Court in Neuman v. Northwest expressly rejected this analysis:

> The general language, however, was inserted into the ADEA by Congress as a means of overruling previous judicial interpretations of the FLSA which had held that injunctive relief was unavailable in private actions under the FLSA. See Lorillard, supra, at 581. This language was not meant to expand the legal relief expressly provided under section 16(b) of the FLSA.

28 FEP Cases at 1491. In Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 810 (8th Cir. 1982), the Eighth Circuit substantially undermined the rationale of the EEOC v. ALPA decision when it emphasized the critical role that the remedial scheme of the FLSA plays in the scope of §7(b) of the ADEA in denying claims for pain and suffering damages under the ADEA.[6]

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[6]Other Courts of Appeals to consider the remedies authorized by §7(b) of the ADEA, 29 U.S.C. §626(b), have similarly emphasized the limits imposed by the incorporation of the remedial scheme of the FLSA into the ADEA. See Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686 (7th Cir.), cert. denied, 103 S.Ct. 453 (1982); Naton v. Bank of California, 649 F.2d 691, 699 (9th Cir. 1981); Slatin v. Standard Research Institute, 590 F.2d 1292 (4th Cir. 1979); Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978); Dean v. American Security Insurance Co., 559 F.2d 1036 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978). Accord Hill v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983). Cf. Rogers v. Exxon Research & Engineering Co., 550 F.2d 834, 839-840 (3d Cir. 1977), cert. denied 434 U.S. 1022 (1978)

II

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE DECISIONS OF THIS COURT, AND DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED IN THIS CASE

The petition for certiorari flies in the face of two recent decisions of this Court. In Lorillard v. Pons, 434 U.S. 575, 582 (1978), this Court relied on the decision by Congress to incorporate the "remedies and procedures of the FLSA" into the ADEA "'to the greatest extent possible...'" in holding that private plaintiffs in an ADEA action were entitled to a jury trial. The suggestion by TWA that this Court should determine the scope of ADEA remedies by reference to abstract statutory "purposes",

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(denying pain and suffering damages on other grounds).

or by analogies to "national labor laws" other than the FLSA, is thus fundamentally inconsistent with Lorillard v. Pons.

In Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981), this Court held that an employer may not seek contribution against a labor organization under either Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e-17, or the Equal Pay Act ("EPA") provisions of the FLSA, 29 U.S.C. §206(d). This Court concluded that employers were not members of the special class for whose benefit the statutes were enacted, 451 U.S. at 92, and expressly declined to consider the underlying question of an employee's right to recover money damages against a labor organization which violates the EPA. 451 U.S. at 88, n.20. As did the employer in

Northwest, TWA requests this Court to determine the rights of employees to recover damages against unions as the basis for reducing its own liability for adjudicated statutory violations.[7]

The fundamental question of an employee's rights under §7(b) of the ADEA should be determined in a case in which an employee has a direct stake in labor

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[7]In analyzing whether Title VII or the Equal Pay Act provided special protection for employers, the Court held that the language of the statutes did not support implication of a right to contribution, but left open the question of a court's power under §706(g) of Title VII "to fashion relief against all respondents named in a properly filed charge...." 451 U.S. at 93, n. 28. The Court did not make a similar reservation with respect to the Equal Pay Act. Section 706(g) of Title VII expressly authorizes backpay awards "(payable by the employer, employment agency or labor organization...responsible...for the unlawful employment practice....)" 42 U.S.C. §2000e-5(g).

organization monetary liability; the secondary question of a jointly liable employer's right to shift damages under the ADEA should only be decided along with or after that decision, rather than in the first case in which it arises.

A. The Decision of the Second Circuit Is Consistent with the Decision of this Court in Lorillard v. Pons, and Lower Federal Court Decisions Construing the Remedial Provisions of the EPA, FLSA and ADEA

Section 7(b) of the ADEA, 29 U.S.C. §626(b), states that ADEA "shall be enforced in accordance with the powers, remedies and procedures" of Section 16 and 17 of the FLSA, 29 U.S.C. §§216 and 217, and §7(c) of the ADEA.[8] At the time the ADEA was enacted, the FLSA prohibited labor

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[8]Section 7(c) of the ADEA has been construed "to give individuals the ability to take advantage of the relief conferred in §626(b)", but is not "an independent

organizations from causing or attempting to cause an employer to discriminate on the basis of sex in the payment of wages, 29 U.S.C. §§206(d)(2), 215(a)(2), and from discriminating against any employee because that employee participated in FLSA proceedings, 29 U.S.C. §215(a)(3), but did not provide for any money damages against unions which violated those prohibitions.

Section 16(b) of the FLSA, 29 U.S.C. §216(b), provided a private cause of action only against an "employer", defined in §3(d) of the FLSA, 29 U.S.C. §203(d), as "any person acting directly or indirectly in the interest of an employer in relation to an employee...,but shall not include any

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source of remedies under the statute." Pfeiffer v. Essex Wire Corp., 682 F.2d at 685, n.1.

labor organization...." All courts to address the question have construed the exclusive use of "employer" in §16(b) not to authorize private actions against unions, and accordingly, have denied employee damages claims[9] and employer contribution claims[10] against unions alleged to have violated FLSA prohibitions.[11]

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[9]Lyon v. Temple University, 507 F.Supp. 471, 474-475 (E.D. Pa. 1981); Cook v. Mountain States Telephone & Telegraph Co., 397 F.Supp. 1217, 1226 (D. Ariz. 1975); Hunter v. United Air Lines, 10 FEP Cases 787, 788 (N.D. Cal. 1975); Tuma v. American Can Co., 367 F.Supp. 1178, 1181 (D.N.J. 1973).

[10]Northwest Airlines, Inc. v. Transport Workers Union, 606 F.2d 1350, 1355 (D.C. Cir. 1979) (footnote omitted), aff'd in part on other grounds and vacated in part, 451 U.S. 77 (1981). Denicola v. G.C. Murphy Co., 562 F.2d 889, 894-895 (3rd Cir. 1977); Wust v. Northwest Airlines, Inc., 86 LC ¶33,811 at p.48,805 (W.D. Wash. 1979).

[11]When Congress amended §16(b) in 1974 (to apply to public employees), P.L. 93-259, §§6 and 28, and in 1977 (to remedy violations of §15(a)(3), the retaliation provisions of the FLSA), P.L. 95-151, §10, these newly

Section 17 of the FLSA, 29 U.S.C. §217, authorizes suits for injunctive relief by the Secretary of Labor, see, e.g., Lorillard, 434 U.S. at 581, including the "restraint of any withholding of payment of minimum wages or overtime compensation." Congress added this express authorization for recovery of wrongfully withheld payments to deprive FLSA violators of wrongful gains, and protect employers "who comply with the act from having to compete unfavorably with employers who do not comply." Wirtz v. Malthor, Inc., 381 F.2d 1, 3 (9th Cir. 1968).[12] The lower federal courts have routinely rejected contribution claims in §17 actions by employer-

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created private rights of actions were expressly limited to actions against an "employer".

[12] See Hodgson v. American Can Co., 440 F.2d 916 (8th Cir. 1971); Marshall v. A & M Consolidated Independent School District, 605 F.2d 186, 189 (5th Cir. 1979); Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d

defendants as inconsistent with the language and purpose of §17.[13]

> "Because 'employers', and not unions, can be liable to employees under the FLSA for unpaid minimum wages or overtime compensation, it follows that only 'employers' are capable of wrongfully withholding such funds from employees. Therefore, only "employers" may be restrained from engaging in such withholding."

Neuman v. Northwest, 28 FEP Cases at 1490-1491. With a single exception, the Secretary of Labor and EEOC have not brought any §17 actions against labor organizations to recover withheld wages under the EPA or FLSA.[14]

Cir. 1971).

[13]EEOC v. Ferris State College, 493 F.Supp. 707, 716-717 (W.D. Mich. 1980); Marshall v. Tombs Janitorial Service, 82 LC ¶33,559 (W.D. Mo. 1977); Usery v. Beloit College, 12 EPD ¶11,203 (W.D. Wisc. 1976); Brennan v. Emerald Renovators, Inc., 410 F.Supp. 1057 (S.D.N.Y. 1975); Wirtz v. Hayes Industries, 1 EPD ¶9874 (N.D. Ohio 1968).

[14]The only reported case in which the Secretary sought to obtain a monetary remedy

In Lorillard, this Court noted that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." 434 U.S. at 581. The Court observed that Congress made three

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from a labor organization invoked the general equitable powers of the Court, rather than a construction of the scope of §17. In Hodgson v. Sagner, Inc., 326 F.Supp. 371, 374 (D.Md. 1971), aff'd sub nom. Hodgson v. Baltimore Regional Joint Board, 462 F.2d 180 (4th Cir. 1972), the Court awarded the Secretary of Labor monetary relief against a union based solely on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination. The courts have consistently refused to read Sagner as support for an employer right to contribution against unions. Northwest v. TWU, 606 F.2d at 1356; Denicola v. G.C. Murphy, 562 F.2d at 894; EEOC v. Ferris State College, 493 F.Supp at 716-717; Brennan v. Emerald Renovators, 410 F.Supp. at 1062.

changes in §16 in incorporating the remedial provisions of the FLSA into §7(b) of the ADEA. First, Congress provided equitable relief to employees which was not available under the FLSA. 434 U.S. at 581. Second, liquidated damages were restricted to cases of willful violations of ADEA, in contrast to the automatic award of liquidated damages in a §16(b) action under the FLSA (subject only to the "good faith" defense available under 29 U.S.C. §260). 434 U.S. at 581 and n.8. Third, the criminal sanctions in §16(a) of the FLSA, applicable to "any person" who violated §15 of the act, were deleted from the ADEA. 434 U.S. at 582. Otherwise, as the Court in Lorillard emphasized, the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for

those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." 434 U.S. at 582.

While Courts have the power to award "such legal or equitable relief as may be appropriate to effectuate the purposes of ADEA...," 29 U.S.C. §626(b), (c), the general reference to "legal relief" has not been construed to authorize remedies beyond those provided for in §16(b) of the FLSA. See, e.g., Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 109 (1st Cir. 1978), and cases cited at 14, n. 6, supra. The "equitable relief" language in §7(b) neither provides an alternative basis for money damages in ADEA actions, see Lorillard, 434 U.S. at 583, n.11, and 29 U.S.C. §626(c)(2)[15], nor adds to the §17

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[15]The original decision of the Court of Appeals, creating an equitable backpay

remedies available to the government.[16]

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remedy for ADEA violations, A-34-35, is directly contrary to the decision in Lorillard. This Court concluded that Congress manifested an intent to provide a right to a jury trial by creating a "legal" remedy for lost wages under §16(b) of the FLSA (which had been construed to provide a right to a jury trial) rather than an equitable "backpay" remedy analogous to Title VII or §17 of the FLSA (which had been construed not to provide a right to a jury trial in actions to recover lost wages). Lorillard, 434 U.S. at 580, n.7. Indeed, the determination that ADEA created an equitable backpay remedy in private ADEA actions led the Court in Morelock v. NCR Corp., 546 F.2d 682, 688 (6th Cir. 1976), vacated and remanded, 435 U.S. 911 (1978), to conclude that a jury trial was not permitted in a private ADEA action,

Congress reaffirmed the distinction between the legal and equitable remedies in §7(b) of ADEA, 29 U.S.C. §626(b), in the 1978 amendments to ADEA. In enacting §7(c)(2) of ADEA, P.L. 95-256, §4(a), Congress characterized all "amounts owing" as a result of violations of ADEA to be legal relief. House Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, 1978 U.S. CODE CONG. & AD. NEWS 528, 535.

[16] In Marshall v. Eastern Airlines, Inc., 474 F.Supp. 364, 367 (S.D. Fla. 1979), aff'd on other grounds, sub. nom., E.E.O.C. v. Eastern Airlines, Inc., 645 F.2d 69 (5th Cir.), cert. denied, 102 S.Ct. 96 (1981),

The "policy" arguments offered by TWA in reliance on this general language simply fail to come to grips with the fact that §7(b), in its entirety, must be construed in the context of Congress' decision to incorporate the remedial scheme of the FLSA into the ADEA. See Lorillard, 434 U.S. at 583-585.

Congress did not modify the "employer" limitations of §16(b) of the FLSA in enacting ADEA.[17] By its incorporation of the remedial scheme of the FLSA into ADEA in 1967, Congress plainly intended to make §16 and §17 of the FLSA the measure of monetary remedies available in ADEA

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the Court noted that "under Section 7(b) of the ADEA, the Secretary of Labor enforces violations of ADEA and recovers damages through Section 17 of the FLSA."

[17]In LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), the Court rejected the argument that the "written consent" requirement of §16(b) of the FLSA should not be applied in ADEA actions

actions. Neuman v. Northwest, 28 FEP Cases at 1489. "In order to determine whether a union may be held liable to one of its members for his lost wages under the ADEA, it is necessary to determine whether a union would have such liability under the FLSA. Id. at 1490. There is no basis to imply monetary remedies against labor organizations under §7(b) of ADEA which are not provided in the FLSA.

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in the absence of a discussion of that issue in the legislative history of ADEA. 513 F.2d at 289.

> "Had Congress desired to read out the [written consent requirement in] the third sentence [of §16(b)] it could have done so. It has not, and we may not. Any argument that the inclusion of the consent requirement undercuts the broad remedial purposes of ADEA should be made to the legislature and not to the courts."

513 F.2d at 289 n.10.

Both the FLSA and ADEA prohibit union conduct which causes an employer to discriminate in violation of the act, compare §6(d)(2) of the FLSA, 29 U.S.C. §206(d)(2), with §4(c)(3) of the ADEA, 29 U.S.C. §623(c)(3), or to retaliate against an employee who exercises statutory rights, compare §15(a)(3) of the FLSA, 29 U.S.C. §215(a)(3) with §4(d) of the ADEA, 29 U.S.C. §623(d). In terms of deterring violations of statutory prohibitions, there is no logical difference between the remedies necessary to achieve this purpose under the EPA, the FLSA or the ADEA.

TWA's analogies to Title VII and judicially created remedies for breaches of the duty of fair representation implied under the Railway Labor Act are similarly deficient. Section 706(g) of Title VII, 42

U.S.C. §2000e-5(g), contains express language imposing backpay liability on labor organizations; sections 16 and 17 of the FLSA, and §7(b) of the ADEA, lack any express monetary remedy against labor organizations. While TWA relies on the similarity of the substantive provisions of Title VII and the ADEA as a basis for union monetary liability, in Lorillard this Court found "petitioner's argument by analogy to Title VII unavailing":

> There are important similarities between the two statutes, to be sure, both in their aims - the elimination of discrimination from the workplace - and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived in haec verba from Title VII. But in deciding whether a statutory right to jury trial exists, it is the remedial and procedural provisions of the two laws that are crucial and there we find significant differences.

434 U.S. at 584 (footnote omitted, emphasis added).

The analogy to duty of fair representation remedial principles is similarly misplaced. As this Court emphasized in holding that punitive damages are not available against a union which breaches its duty of fair representation,

> We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of [other statutes] and the[ir] accompanying legislative history authorize punitive damages awards obviously involves different considerations.

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 47 n.9 (1979). The role of the federal courts in the development of appropriate remedies under the judicially implied duty of fair representation is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." Northwest v. TWU,

451 U.S. at 97. "[W]hen Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," such as the EPA or ADEA, "[t]he judiciary may not, in the fact of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." Id.

B. The Instant Case Is Not Appropriate for Considering the Question of Labor Organization Liability for Money Damages for Violations of §4(c) of the ADEA

The construction of §7(b) sought by TWA will not result in any benefit to plaintiffs in this action. This is not a case in which the plaintiff "members of the class for whose special benefit" ADEA was enacted, cf. Northwest v. TWU, 451 U.S. at 92, anticipate any economic loss from the

decision TWA asks this Court to review.[18] Both the individual plaintiffs and EEOC appear to be content to pursue "make whole" relief solely from TWA, without the additional expense and delay of litigating the causal nexus between specific conduct by ALPA and TWA in violation of ADEA, and particular economic injuries to plaintiffs, and the relative wrongdoing of the defendants, in that regard.

Furthermore, TWA may have waived any right to shift a portion of the damages plaintiffs seek to recover by failing to plead a cross-claim against ALPA in Thurston. In any event, even if TWA prevails before this Court, it may still fail to prove that unlawful conduct by ALPA, in fact, directly caused economic

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[18] Cf. Bowen v. United States Postal Service, 103 S.Ct. 588 (1983) (reversing a Court of Appeals decision holding that labor organizations are not liable for lost

injury to plaintiffs.[19]

TWA's assertion of "myriad situations ...wherein employers and unions are being jointly challenged under the ADEA," Pet. at 17, is simply unsupported by the federal court decisions reported to date. As TWA noted in its petition, only two other lower federal court decisions have addressed the question of union liability for money damages. The instant case is the only reported decision in which a labor organization has ultimately been found to have violated ADEA. Aside from cases involving the impact of the FAA Age 60 Rule on flight deck crew working conditions, only eight reported cases since the

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wages following from the breach of its duty of fair representation, which resulted in a reduction in the judgment for lost wages).

[19]The Second Circuit held that ALPA violated §4(c)(3) by entering into the 1979 Agreement and causing TWA to implement the 1980 "fulfill bids in a timely manner" policy.

enactment of ADEA have involved labor organization defendants.[20]

Given the lack of any economic benefit to plaintiffs from a review of the Second Circuit decision, the absence of a final judgment in this case, and the embryonic state of the lower federal court decisional law with respect to labor organization

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With respect to the three plaintiffs who reached age 60 after the effective date of the 1979 agreement, TWA was no more constrained by the unchanged language in §§4.1 and 4.2 of the Plan incorporated in the 1979 Agreement than it had been under the 1977 Agreement; the construction of §4.2 which, TWA believed, authorized it to allow a flight engineer to exercise seniority rights after 60 is similarly applicable to other flight deck crew members.

With respect to the 1980 "timely manner" requirements, TWA's own official has questioned whether ALPA caused the Company to adopt the policy. See supra at 9-11, n. 5.

[20] De Loraine v. MEBA Pension Trust, 499 F.2d 49 (2d Cir. 1974); Moon v. Aeronca, Inc., 541 F.Supp. 747 (S.D. Ohio 1982); Rodgers v. Grow-Kiewit Corp., 93 LC ¶13,431 (S.D.N.Y. 1981); Rhoades v. Book

monetary liability for violations of the ADEA, TWA has failed to demonstrate that this case presents important questions of federal law which are appropriate for resolution by this Court.

Press, 458 F.Supp. 674 (D. Vt. 1978); Balc v. United Steelworkers of America, 6 FEP Cases 824 (W.D. Pa. 1973); Chaudoin v. Air Line Pilots Association, 6 FEP Cases 107 (D.D.C. 1973); Hart v. United Steelworkers of America, 530 F.Supp. 294 (W.D. Pa. 1972), vacated as moot, 482 F.2d 282 (3d Cir. 1973); Kincaid v. United Steelworkers of America, 5 FEP Cases 235 (N.D. Ind. 1972).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied as to the second question presented.

Respectfully submitted,

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APPENDIX A

APPENDIX A

FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C.

§203. Definitions

As used in this chapter -

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

§206. Minimum wage

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed,

between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

§215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person -

* * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because

such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

§216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including

a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of

this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of

this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages

provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a)

of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceeding commenced prior to, on, or after August 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam,

the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a)(3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provision of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such peanlty, when finally determined, may be -

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor, or

(3) ordered by the court, in an action brought for a violation of section 215(a)(4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the

violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title.

§217. Injunction proceedings

The district courts, together with the United States District Court for the District of the Canal Zone, the District

Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

APPENDIX B

APPENDIX B

TRANS WORLD AIRLINES, INC.

SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration)
Between:)
)
H.H. THURSTON)
)
-and-)
)
TRANS WORLD AIRLINES, INC.)

ALPA Case No. NY-83-78

INTRODUCTION

Arbitration hearings between the parties were held at the Company's offices in New York, N.Y. on October 5 and November 10, 1978. A transcript of the proceedings was made and post-hearing briefs were submitted by the parties in January of 1979.

APPEARANCES

For the Grievant:

Raymond C. Fay, Esq.

For the Association (ALPA):

Gary Green, Esq.

For the Company:

Henry J. Oechler, Esq.

System Board of Adjustment:

H.F. Mokler
J.E. Kaczynski
S.H. Mariani
J.W. Hoar
Harry T. Edwards, Neutral

FINDINGS

The instant grievance protests the involuntary retirement of Captain Harold H. Thurston on June 11, 1978, at the time when Captain Thurston reached his sixtieth birthday. It is undisputed that the sole reason for the involuntary termination of Captain Thurston was his age.

Captain Thurston was first employed as a pilot with the Company in 1942. He served as a Captain with TWA from 1945

until his forced retirement in June of 1978. Captain Thurston always qualified for promotion during his tenure with the Company and the record reveals that he flew approximately 28,000 hours as a pilot for TWA. At the time of his retirement, Captain Thurston was a qualified "Captain" but he was not "Flight Engineer" qualified.

On May 19, 1978, before his forced retirement, Captain Thurston wrote to Company officials requesting continued employment beyond age 60. On May 26, 1978, TWA's Vice President of Flight Operations advised the grievant by letter that "TWA's agreement with ALPA, which applies to you, as well as the retirement program established thereunder, provides that retirement is required upon reaching

one's 60th birthday."

On June 2, 1978, Captain Thurston filed a standing bid, effective June 6, 1978, which included displacement options to Flight Engineer at five different domicile locations. However from June 6, 1978 until June 8, 1978 (the date on which grievant filed a Telegram Bid), there were no bulletins published by the Company announcing any Flight Engineer vacancies.

On June 8, 1978, Captain Thurston filed a Telegram Bid "to displace in lieu of displaced LAX Captain to Flight Engineer SFO," pursuant to Company Bid Message No. 10, dated June 6, 1978. However, the grievant was unable to change his status pursuant to his Telegram Bid because the displacements in Bid Message No. 10 were not scheduled to take

effect until July 1, 1978, after grievant's forced retirement. The Company also claims that the Telegram Bid could not have been honored under Section 19(G)(7) because Captain Thurston was not qualified for the Flight Engineer status and because the Flight Engineer position at San Francisco sought by Captain Thurston was not among the choices available to displaced pilots under Section 19(G)(3).

Captain Thurston's grievance protesting his forced retirement was filed on June 5, 1978. The grievance was denied by letter dated July 16, 1978.

In July of 1978, following the retirement of Captain Thurston, TWA officials initially indicated that, retroactive to April 6, 1978 (the effective date of the

Congressional amendments to the Age Discrimination in Employment Act), all Pilots and Flight Engineers who had reached age 60 would be allowed to continue as Flight Engineers beyond their 60th birthday. Following several meetings between Company and ALPA officials, the Company finally adopted a policy, by unilateral action, which allowed for the continued or reactivated employment of "any cockpit crewmember who is in a Flight Engineer status at age 60," retroactive to April 6, 1978. This new "Policy" was announced on August 10, 1978 and, pursuant to the Policy, several persons who had reached age 60 between April 6, 1978 and August 10, 1978, and who were Flight Engineer qualified and in Flight Engineer status at age 60, were reinstated as

Flight Engineers.[1] Additional persons were allowed to continue in employment as Flight Engineers after August 10, 1978 pursuant to the new Policy.

The Company maintains that Captain Thurston was not reinstated pursuant to the August 10, 1978 Policy because he was not in a Flight Engineer status on the date of his forced retirement. The record also indicates that there were no Flight Engineer vacancies into which Captain Thurston could have moved between April 6, 1978 and June 11, 1978 (the date of his retirement).

ALPA, in a separate court suit (Air Line Pilots Ass'n. v. TWA, 78 Civ. 3707, Federal District Court, S.D.N.Y.), has

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[1]One of the five persons who was reinstated under the new Policy was George Ways, an International Relief Officer (IRO) at the

alleged that the August 10, 1978 Policy adopted by TWA "constitutes a major and unilateral change in existing conditions of employment, and is therefore prohibited by the Railway Labor Act." ALPA also claims that "the 1978 amendments to ADEA did not invalidate pre-existing arrangements [requiring the retirement of all Pilots at age 60] because ADEA, even as amended, does not prohibit mandatory retirement provisions which represent bona

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time of his retirement. The Company claims that Mr. Ways was reinstated because he was Flight Engineer qualified at age 60 and because he enjoyed "special contractual rights" to a Flight Engineer seat pursuant to the merger arrangement between ALPA and FEIA in 1962. Since (as noted hereafter) the Board is without authority to rule on the legitimacy of the Company's August 10, 1978 Policy, it is unnecessary to determine whether Mr. Ways did indeed have "special contractual rights" as claimed by the Company.

fide occupational qualifications...such as air safety requirements."

Articles 4.1 and 4.2 of the applicable Retirement Plan adopted by TWA and ALPA covering TWA Pilots provides that:

> "4.1 The normal retirement date is the Member's 60th birthday.
>
> 4.2 Members must retire by their normal retirement date unless written approval of the Company is granted for continuance of employment."

The "normal retirement" provision was included in the parties' 1954 Retirement Plan, along with a "no prejudice" clause which read as follows (Thurston Ex. 8):

> "13. It is the Company's continuing position that it has the right to require the retirement of a pilot at age 60. The Association questions the right of the Company to require such retirement. Neither the Company nor the Association intends, in any way, to prejudice its position or the

> position of the other party in this regard by anything contained in this agreement or in the trust annuity plan to be drawn up as a result hereof."

In 1960, in a System Board decision involving a grievance filed by Donald R. Terry and construing the 1954 Retirement Plan and applicable collective bargaining agreement, it was held that the grievant there could not be forced to retire at age 60. However, the Neutral in the Terry case stated that the ruling was "based upon facts and circumstances relating to the grievant's employment status [in 1959] prior to the issuance of the [FAA] regulation [prohibiting persons from working as pilots after age 60]." The Neutral in Terry noted that the "Board may not concern itself with the effect of the FAA regulation or the future status of the grievant [because] the regulation was not

in existence and did not have the effect of law at the time that the issue arose ..." in the Terry case.

The FAA regulation referred to in the Terry award, sometimes called the "Quesada Rule," provided that:

> "Sec, 121.383(c). No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday. No persons may serve as a pilot on an airplane engaged in operations under this part if that person has reached his sixtieth birthday."

Following the adoption of the Quesada Rule, and notwithstanding the "no prejudice" language which was retained in the Retirement Plan until 1977, TWA uniformly required all flight deck crew members to retire upon reaching their 60th birthday. This practice, requiring the forced retirement of all pilots at age 60,

remained in full force and effect, without successful challenge, until the initiation of this grievance complaint.

It is noteworthy that the language in 4.2 of the Retirement Plan, requiring that pilots "must" retire at age 60, first appeared in the 1959 Retirement Plan which was actually negotiated after the issuance of the Terry award (Compare Thurston Exs. 8 & with Thurston Ex. 10). It is also noteworthy that the 1977 Retirement Plan negotiated by the parties (which was in effect when Captain Thurston retired) excluded for the first time the "no prejudice" clause that had been in the Plan since 1954. In addition, the 1977 Retirement Plan specifically provides that all prior agreements under the Plan are "superseded and terminated." The 1977

Retirement Plan requires that all pilots "must" retire at age 60 and this provision is not modified in any way by a "no prejudice" clause or like provision. Therefore, even if the "no prejudice" clause somehow limited Articles 4.1 and 4.2 in the Retirement Plans in force from 1954 until 1977, no such limitation appeared in the Retirement Plan or in the parties' collective bargaining agreement when Captain Thurston was forced to retire in 1978.

DISCUSSION

Given the facts of this case, it must be held here that the grievance is without merit. It must be emphasized, however, that in deciding this case, the System Board renders no opinion with respect to

any legal rights that Captain Thurston might have under the ADEA. Nor does the Board intend to render any opinion with respect to what rights, if any, Captain Thurston might have under the Company's August 10, 1978 Policy (if that Policy is hereafter found to be lawful by the courts).

The simple question here is whether Captain Thurston had any rights under the parties' agreements (in force in June of 1978) to be retained in employment as a Captain, First Officer or Flight Engineer after he had reached his 60th birthday. On the record in this case, it seems perfectly clear that he had no such rights.

First of all, whether or not the Company may permissibly retain "Flight Engineers" beyond age 60 under existing

law, the facts here indicate that Captain Thurston was not a Flight Engineer at the time of his forced retirement, nor was he even qualified to assume such a position.

Second, there was nothing in the parties' agreements which allowed Captain Thurston to move into a Flight Engineer position in the absence of an available vacancy and at a time when he was not Flight Engineer qualified. Grievant's counsel has pointed to Section 6(B)(16) and (17) and 19(A)(4) to suggest otherwise; however, even a cursory reading of those provisions makes it plain that they afforded no relief for Captain Thurston at the time of his forced retirement in June of 1978. Section 6(B)(16) refers to pilots who "fail initial upgrading;" Section 6(B)(17) refers to

pilots who "fail to requalify;" and Section 19(A)(4) refers to pilots whose "medical certificates are subject to operational limitation imposed by the Administrator." None of these provisions can be seen to have given Captain Thurston the right to automatic placement in a Flight Engineer position as claimed by grievant's counsel.

Third, for the reasons noted hereinabove, it must be found that the Terry decision is not controlling in this case. The "no prejudice" language adopted in the 1954 Retirement Plan was excluded from the 1977 Retirement Plan. In addition, the 1959 Retirement Plan, which was negotiated after the issuance of the Terry award, added language stating that pilots "must retire by their normal retirement date" at

age 60. Thus, the explicit language of the Retirement Plan in force in June of 1978, coupled with the longstanding practice uniformly followed by the parties between 1960 and 1978, make it rather clear that Captain Thurston was properly retired upon reaching his 60th birthday in June of 1978. The Terry decision, by its terms, was a limited judgment which was no longer applicable in 1978 due to the changed circumstances occuring between 1960 and 1978.

As for the claim that Captain Thurston should have been retained under the Company's August 10, 1978 Policy, the simple answer to this is that it is a matter that is beyond the jurisdiction of this Board. The Company Policy was adopted unilaterally in an attempt to

comply with the 1978 amendments to the ADEA. It is clear, therefore, that the Policy was not contractually mandated. Whether the policy was mandated by and permissible under existing law is a matter for the courts to decide. If it is hereafter determined that the Company was justified in adopting the August 10, 1978 Policy, then Captain Thurston may of course raise whatever claim he may have to any rights or benefits given pursuant to the Policy. However, this is not an issue that can be decided by the System Board at this time.

One further point should be made here in conclusion. At the start of these proceedings, Captain Thurston requested that this case should be decided by the Neutral alone, without the participation of the

Company and ALPA Board members. Implicit in this request was the suggestion that ALPA was not a neutral party in this case and that the case would therefore be "stacked" against Captain Thurston. To set the record clear, the Neutral is constrained to note that, without regard to the so-called official Association position as stated by the ALPA attorney, the two ALPA designees on the Board did not hold to any partisan view. In fact, after hearing the evidence in the case, both ALPA designees argued forcefully on behalf of Captain Thurston during the deliberations of the Board leading to this decision. Therefore, the Neutral has no reservations in stating that Captain Thurston received a fair hearing before this System Board.